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No. _____

Supreme Court of the United States

OCTOBER TERM, 1992

Wm. F. McCOLLOUGH et ux., Petitioners,

vs.

A.G. EDWARDS & SONS, Inc., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where statutory tort claims are submitted to arbitration under a pre-dispute contract containing an arbitration clause, the arbitrators' award contains neither findings and conclusions nor any reasoned explanation of the decision, and the record strongly suggests that the award was influenced by legal contentions of the prevailing party which are clearly erroneous under applicable statutory law, may the district court, in order to ensure that the dispute is resolved in accordance with statutory law, vacate the award?

2. Where the party defending statutory tort claims in an arbitration proceeding conducted pursuant to a pre-dispute arbitration agreement asserts multiple facially invalid defenses, at least some of which he knows or should know to be invalid under applicable statutory law, and an arbitral award in favor of the defending party is procured through such conduct, may the district court vacate the award?

3. Even if, as the Court of Appeals' opinion puts it, "offering a meritless defense is part and parcel of the business of litigation," when a party defending a statutory tort claim in arbitration both offers and emphasizes a defense which is meritless under applicable statutory law, does the principle that by agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute require that an ensuing award in favor of the defending party be subject to vacatur at the award-enforcement stage?

LIST OF PARTIES

The parties to the proceedings below were Petitioners William F. McCollough and Jeanene McCollough and Respondent A.G. Edwards & Sons, Inc., a Delaware corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners William F. McCollough and Jeanene Mccollough respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, with respect to which a timely Petition for Rehearing was denied on July 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 967 F. 2D 1401, and is reprinted in the appendix hereto, p. A.1, *infra*. The opinion of the District Court for the District of Arizona (Rosenblatt, D.J.) is reported at 764 F. SUPP. 1365, and is reprinted in the appendix hereto, p. A.8, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and 9 U.S.C. § 9, Respondent A.G. Edwards & Sons, Inc. ("Broker") brought action in the District of Arizona to confirm an arbitrators' award, and Petitioners McCollough ("Investors") crossclaimed seeking vacatur of the award. The District Court vacated the award and ordered re-arbitration before a new panel of arbitrators.

Broker initiated a timely appeal to the Ninth Circuit Court of Appeals, under 9 U.S.C. § 16 (a) (1) (E). The Ninth Circuit, on June 26, 1992, entered a judgment and opinion reversing the district court's judgment and directing that the arbitrators' award be confirmed. Investors filed a timely petition for rehearing, which the Ninth Circuit denied on July 28, 1992.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

15 U.S.C. § 77n, [Securities Act of 1933, § 14]:

Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules or regulations of the Commission shall be void.

15 U.S.C. § 78cc, [Securities Exchange Act of 1934, § 29]:

(a) Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

9 U.S.C. § 10:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioners McCollough ("Investors") are a retired couple in their 60s. They first opened an account with Respondent A.G. Edwards, Inc., a securities broker-dealer ("Broker") in 1985. The account out of which the present controversy arises was opened in 1986. Their stated investment objectives, as recorded by Broker in the account records, were, in order of priority, first, safety of principal, second, growth and third, income.

On October 19, 1987, open option positions on Investors' account were closed, to their loss, on that day, of more than $900,000. All of Investors' other assets in Broker's hands were liquidated, and the net result was an account balance owing from Investors to Brokers of almost $260,000. Investors alleged, but Broker denied, that the trades resulting in the loss were unauthorized.

On November 2, 1987, at Broker's offices, an in-house collection attorney representing Broker presented to Investors a note giving them 90 days to pay. The note

contained general release language, pursuant to which Investors purportedly waived all claims of any nature against Broker. Investors signed the note without knowing of any potential claims or causes of action which they might have under the securities laws.

Investor's original customer agreement with Broker, a printed form prepared by Broker, included a provision for arbitration of any claims which might be asserted by Investors. Pursuant to this pre-dispute agreement, Investors submitted an arbitration request to the New York Stock Exchange in October, 1988.

Investors alleged violations of Section 10 (b) of the Securities Exchange Act of 1934 and regulations thereunder, Arizona securities statutes, the Arizona Consumer Fraud Act, Arizona "mini-RICO" law and federal RICO statutes. Broker counterclaimed for the balance due on the November 2, 1987 note. Arbitration hearings before a three-man panel consisting of one practicing attorney, one retired banker and one retired phone company executive were held at Phoenix in the fall of 1990.

In its defense, Broker asserted: that contributory negligence was a defense to Investors' claims, including the Arizona blue sky claims; that Broker's "good faith" was a defense to Investors' claims, including the Arizona blue sky claims; that Investors could have no private right of action under the Arizona Consumer Fraud Act if the alleged misconduct was also violative of Arizona securities statutes; and that even if Broker had been liable to pay damages to Investors under state or federal securities statutes or otherwise, the general release language of the November 2, 1987 "note and release" was a binding and

effectual waiver of any such claim. None of these defenses was ever withdrawn by Broker.

The waiver defense based on the "note and release" was strongly emphasized by Broker throughout the hearing, including closing arguments. However, the uncontroverted evidence was that not only Investors but also Broker's attorney and branch office manager, who represented Broker in connection with the note and release, had no knowledge concerning Investors' potential state and federal securities law claims when the note and release was executed. Broker's distinguished counsel, laying the "note and release" before the banker and the phone company executive, presented common law waiver and release arguments wholly without regard to the special requirements of securities law, in effect contending that a post-transaction waiver which would be binding in the context of an ordinary sale of goods or similar commercial transaction must also be effective in the context of a securities transaction.

Two of the arbitrators concurred in a three-line award whereby Investors took nothing and their liability to Broker on the note was upheld. No findings, conclusions or explanations were given, and no reasons for the award were stated. The third arbitrator (the practicing attorney) dissented and indicated that he would grant Investors' claim, including treble damages under state law, plus expenses.

Broker then commenced a district court action under the Federal Arbitration Act to enforce the award, and Investors contested that action, seeking vacatur of the award. The district court, Hon. Paul G. Rosenblatt, was under the impression that the arbitrators' error in the application or interpretation of securities statutes would

not constitute grounds for vacatur of the award. Although Investors complained of the legal invalidity of the four defenses asserted by Broker and discussed above, Broker made no attempt to establish their validity.

The district court found that certain of these defenses were "facially meritless" and that Broker "knew or should have known" of the invalidity of at least two of them, and concluded that under the circumstances Broker's assertion of "multiple facially meritless defenses constitutes procurement of an award by 'undue means' within the meaning of 9 U.S.C. § 10 (a) [1]." Accordingly, the district court vacated the award and remanded the matter for arbitration before a new arbitral panel. Broker appealed.

On appeal, Investors offered the following alternative argument in support of the district court's judgment. Unlike arbitrators in an ordinary "unrestricted submission" commercial arbitration, arbitrators deciding a statutory tort claim pursuant to a pre-dispute arbitration agreement are bound to decide according to the law. Therefore, if the arbitrators err in the application or interpretation of relevant statutory law and thus do not resolve the dispute in accordance with statutory law, they act beyond their powers and their award is subject to vacatur at the enforcement stage. It remains only to consider by what means error in the application of statutory law must be shown. The extent of the arbitrators' obligation to explain the award is necessarily related to the scope of judicial review of it. Where the arbitrators choose not to render a reasoned decision, error of law *vel non* cannot be shown directly. In such a case, if the defending party relied upon meritless defenses and if the arbitral record discloses a likelihood that the award was influenced thereby, to deprive the district court of the power to vacate such award and compel the court to

enforce it instead would deprive the arbitral process of the minimal integrity which must be maintained. It would also mean that by agreeing to arbitrate a statutory claim a party would not merely be submitting the resolution of his rights to an alternative forum, but also foregoing substantive rights afforded by the statute.

Disregarding Investors' alternative argument entirely, the Court of Appeals held that there was nothing "undue" about Broker's reliance upon defenses which it knew or should have known to be meritless: "Offering a meritless defense . . . is part and parcel of the business of litigation." Moreover, said the Court of Appeals, where a party to arbitration challenges the award on grounds of "undue means," he must prove that an award in favor of the opposing party would not have been rendered but for the undue means resorted to by that party; that such a showing is almost inherently impossible where no reasons for the award are given is merely another reflection of the "extremely limited scope of judicial review of such awards." Accordingly, the Court of Appeals reversed the district court's judgment and directed entry of an order confirming the arbitration award.

REASONS FOR GRANTING THE WRIT

I. IN OVERRULING *WILKO V. SWAN*, 346 U.S. 427 (1953), THIS COURT HAS IMPLICITLY ENDORSED THE *WILKO* MINORITY'S VIEW THAT IN CASES OF THIS TYPE "APPROPRIATE MEANS OF JUDICIAL SCRUTINY MUST BE IMPLIED."

Where the claim submitted to arbitration under a pre-dispute agreement to arbitrate is a claim arising out of statutory rights and protections belonging to the claimant,

which the claimant could not, by any pre-dispute contract, waive or relinquish, the arbitrators must decide in accordance with the statute even if the agreement has no requirement that the arbitrators follow the law. *Wilko v. Swan*, 346 U.S. 427, 433-34, 436, 74 S.Ct. 182, 186, 98 L.Ed. 2d 168 (1953) (point agreed upon by majority as well as Jackson, J., concurring, 346 U.S. at 439, 74 S.Ct. at 189, and Frankfurter and Minton, JJ., dissenting, 346 U.S. 439, 440, 74 S.Ct. 189), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637-38, 105 S. Ct. 3346, 3359-60, 87 L. Ed. 2d 444 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 230, 231-32, 107 S.Ct. 2332, 2340, 96 L.Ed. 2d 185 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 536, 109 S.Ct. 1917, 1920-21, 104 L.Ed. 2d 526 (1989).

Wilko involved an investor's claim for damages under § 12 (2) of the Securities Act of 1933. Justice Reed, writing for the Court, remarked (citing in support a series of "unrestricted submission" contract-dispute cases, decided both before and after the enactment of the Federal Arbitration Act) that notwithstanding the arbitrators' duty to follow federal securities law, at the award-enforcement stage "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error" and held the pre-dispute arbitration agreement unenforceable for that reason, among others.[1] 346 U.S. at 436-37, 74 S.Ct. at 187.

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1. Federal securities statutes invalidate contractual provisions which prospectively waive the right to pursue statutory remedies for possible securities violations. Section 14 of the Securities Act of 1933

Justice Jackson wrote a brief concurring opinion simply to state that he

> [found] it unnecessary in this case, where there has not been and could not be any arbitration, to decide that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute. 346 U.S. at 438-39, 74 S.Ct. at 189.

Justices Frankfurter and Minton, in dissent, likewise disputed the majority's restrictive view of enforcement-stage judicial review in such a case:

> [Arbitrators are] "bound to decide in accordance with the provisions of section 12 (2)" [of the Securities Act of 1933]. On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," 201 F. 2d 439, 445, appropriate means for judicial scrutiny must be implied, however informal, whereby such compliance will appear, or want of it will upset the award. 346 U.S. at 440, 74 S.Ct. at 189.

The Second Circuit decision reversed in *Wilko* explicitly addressed the district court's concern (see 107 F. Supp. 75, 78 (S.D.N.Y. 1952)) that submission of such

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§14, 15 U.S.C. § 77n; Securities Exchange Act of 1934 § 29 (a), 15 U.S.C. § 78cc.

Although Arizona's securities statutes lack an explicit anti-waiver provision, under similar state statutory schemes an investor's pre-dispute waiver of blue sky law protections has been held invalid on public policy grounds. *Gilbert v. Mason*, 222 S.E. 2d 835, 837-38 (Ga. App. 1975).

disputes to arbitration would deprive investor-claimants of substantive benefits of federal securities law:

> It is urged that arbitration cannot give the same assurance as a trial in court that the arbitrators will apply the proper legal standards, including the provisions of section 12 (2) [of the Securities Act of 1933] as to the shift in the burden of proof and the legal measure of damages, and the requirement of section 14 that the exculpatory provision of the margin agreement [containing investor's purported waiver of securities law claims] be disregarded. The exculpatory provision ... is concededly invalid. Hence no question as to it will be submitted to the arbitrators. With respect to the legal measure of damages and the burden of proof provisions, while it may be true that arbitrators do not ordinarily consider themselves bound to decide strictly according to legal rules, there can be no doubt that they are so bound if the arbitration agreement so provides. Undoubtedly it is true in this country ... when parties have adopted arbitration, ordinarily "They must content themselves with looser approximations to the enforcement of their rights than those the law accords them, when they resort to its machinery." But ... the agreement in the case at bar is subject to the 1933 Act; consequently, the arbitrators are bound to decide in accordance with the provisions of section 12 (2). Failure to do so would, in our opinion, constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C.A. § 10. *Wilko v. Swan*, 201 F. 2D 439, 444-45 (2d Cir. 1953), reversed 346 U.S. 427, 74 S.CT. 182, 98 L.ED. 2D 168 (1953).

Today this Court's opinion in *Wilko* has itself been overruled. This development naturally lends fresh interest

to the dissenting and concurring opinions in *Wilko*, as well as the Circuit Court decision reversed therein. Moreover, the change implies that the Court either: (1.) retains the view that an arbitral award may not be vacated on grounds of erroneous interpretation of law, but is no longer troubled by the implication that the claimant will in such case have waived theoretically non-waivable substantive rights; or (2.) has come around to the more expansiveliberal theory of judicial review espoused in *Wilko* by the Second Circuit and the concurring and dissenting Justices.[2] A careful examination of the line of cases leading to the reversal of *Wilko* demonstrates that the latter alternative is correct.

The formerly prevailing view that a party asserting a tort claim arising out of a violation of federal statute could not be compelled to submit that claim to arbitration on the basis of a pre-dispute arbitration agreement was dealt its first serious blow in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87

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2. The Ninth Circuit asserted that substantive judicial review of securities arbitration awards is precluded by a "strong federal policy encouraging arbitration as a 'prompt, economical and adequate' method of dispute resolution," citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 481. That assertion was an exercise in question-begging. *Rodriguez de Quijas* certainly teaches the remedial adequacy of arbitration; but that this Court deems arbitration remedially adequate means either: (1.) that the Court would now disagree with both the *Wilko* majority and the *Wilko* minority, adhering to the majority's restrictive view of enforcement-stage review of awards made in such cases, but deeming the arbitral remedy adequate *despite* the possiblity that investors' statutory rights would be disregarded; or (2.) that the Court would now agree with the *Wilko* minority, deeming the arbitral remedy adequate *because* the arbitrators' failure to resolve the dispute in accordance with applicable securities statutes would render the award subject to vacation at the enforcement stage.

L. Ed. 2d 444 (1985). In that case, a foreign automobile manufacturer sought to compel arbitration of a dealer's Sherman Act and Clayton Act claims against it, pursuant to an arbitration clause contained in the dealership agreement. Notwithstanding that the Courts of Appeals had "uniformly" held that arbitration could not be compelled in such circumstances, the Court affirmed the district court's decree compelling arbitration of the antitrust claims. The Court rejected the argument that arbitration should not be compelled because the arbitrators might apply what would, in an American court, be considered an erroneous choice-of-law rule, and thus fail to apply American antitrust law. Such rejection, however, reflected a notion that such error, if committed, would be both reviewable and remediable:

> Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko v. Swan*, 346 U.S., at 433-434, 74 S. Ct., at 185-186.[FN 19] . . .
>
> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.[FN 20]

FN 19. ... We ... have no occasion to speculate on [the arbitral panel's application of the correct substantive law of restraint of trade] at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an aribtral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in the federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

FN 20. See n. 19, supra. We note, for example, that the rules of the Japan Commercial Arbitration Association provide for the taking of a "summary record" of each hearing, Rule 28.1; for the stenographic recording of the proceedings where the tribunal so orders or a party requests one, Rule 28.2; and for a statement of the reasons for the award unless the parties agree otherwise, Rule 36.1(4).

473 U.S. at 637-38, 105 S. Ct. at 3359-60.

Then, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 230, 107 S.Ct. 2332, 96 L.Ed. 2d 185 (1987), the Court refused to extend *Wilko* to preclude enforcement of pre-dispute arbitration clauses in the case of an investor's claim for damages under § 10 (b) of the Securities Exchange Act of 1934. However, the viability of *Wilko*'s restrictive concept of judicial review under 9 U.S.C. § 10, along with other aspects of the *Wilko* court's attitude toward arbitration, was openly questioned. Moreover, the

question whether, at the award-enforcement stage, judicial review might include inquiry to determine whether issues had been resolved in accordance with statutory law, was expressly said to have been reserved:

> *Wilko* noted that "the power to vacate an award is limited" and that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436-437, 74 S.Ct., at 187-88.
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> * * *
>
> [M]ost of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. . . . [W]e have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. *Mitsubishi* at 628, 105 S.Ct. at 3354. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. See id., at 636-637, and n. 19, 105 S.Ct., at 3359, and n. 19 (declining to assume that arbitration will not be resolved in accordance with statutory law, but reserving consideration of "effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court.")
>
> 482 U.S. at 231-32, 107 S.Ct. at 2340.

Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989), the Court expressly overruled *Wilko* in a brief opinion which quoted Justice Frankfurter's *Wilko* dissent with approval, 490 U.S. at 536, 109 S.Ct. at 1921, and which heavily stressed a procedural-substantive dichotomy which had been developing since *Mitsubishi*:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. 490 U.S. at 481, 109 S.Ct. at 1920.

II. SUBJECTING THE ARBITRAL AWARD TO REVIEW FOR ERROR IN THE APPLICATION OR INTERPRETATION OF SUBSTANTIVE SECURITIES LAW WOULD BE CONSISTENT WITH ESTABLISHED PRINCIPLES OF ARBITRATION LAW, AS WELL AS PUBLIC POLICY.

The Second Circuit and the minority Justices in *Wilko*, in asserting that where arbitrators are bound to follow the law their award is subject to review for legal error, were not contending for an innovation in the law of arbitration. Rather, they were reasserting an established rule of law which had almost sunk out of sight, swamped by a 20th-Century flood of commercial arbitration cases in which the arbitrators were *not* bound to follow the law.

In resorting to arbitration, disputants may (absent statutory restrictions), but need not, make the arbitrator their law-giver as well as their judge.[3] If the agreement to

3. Where parties agree to accept the result that seems fair and just to the arbitrator, even if the arbitrator is wholly ignorant of, or

arbitrate is silent, it is assumed they want the arbitral process to supply not only the decisional mechanism but also the substantive rules of decision. Arbitration under an agreement which explicitly binds the arbitrators to decide according to law has become a great rarity in modern practice, but it is well established that, in such a case, the award is subject to judicial review for legal error.[4]

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intentionally decides contrary to, the controlling substantive law, they have made the arbitrator their Congress and their Supreme Court:

> If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person, to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But if a distinct question of law . . . is referred . . . and the parties choose to say, they will not take the decision of the Court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree?
>
> . . . The question is, whether by the reference to arbitration they mean to make the arbitrator *pro hac vice* the Law-giver between them.
>
> *Young v. Walter*, 9 VES. JR. 365, 32 ENG. REP. 642, 643 (Ch. 1804) (opinion of Eldon, L. Ch.)

Of course, whatever the parties intend, they cannot prospectively empower an arbitrator to "give" them a securities law which differs from the Securities Act of 1933, the Securities Exchange Act of 1934 and/or applicable blue sky laws.

4. As is already suggested in the passage quoted supra, Note 3: "If [the arbitrator] means to decide according to law, and mistakes, the Court will set that right." *Young v. Walter*, 32 ENG. REP. at 643. There is a long line of authorities distinguishing between (1.) cases wherein the arbitrator is empowered to, and intends to, dispose of the matter in controversy as seems best to him, ***ex aequo et bono*** and according to his own lights, and (2.) those special cases in which the arbitrator is either constrained by the agreement of reference to decide according to the law or indicates in his award that he is attempting to decide according to the law. In the former circumstance (which obtains in the great majority of commercial arbitration cases), courts will not inquire into the legal correctness of the arbitrators' reasoning because

the inquiry would be irrelevant — such arbitrators "may fashion the law to fit the facts before them." *Berman v. Riverside Casino Corp.*, 354 F. 2D 42, 43 (2nd Cir. 1965) Or, to state the point somewhat more fully, an unrestricted submission

> is the commission of the arbitrator. By force of it he . . . may do what no other judge has a right to do; he may intentionally decide contrary to law, and still have his judgment stand. . . . [I]f arbitrators mean to decide according to law, but mistake the law in a material respect, and their mistake appears on the face of the award, or they admit it, the award will be set aside because it does not express their real judgment; but in cases where they do not intend to let the law govern their judgment, but to decide according to their own notions of what is just and right, the courts will not interfere, but allow their award to stand. *Leslie v. Leslie*, 24 A. 319, 320-31 (N.J. Ch. 1892) (citations omitted).

In the latter situation, however — where the arbitrators were bound to, or expressly attempted to, decide in accordance with a body of applicable substantive law — a court may deny enforcement of an award which is legally erroneous. *Kleine v. Catara*, 14 F. CAS. 7,869 p. 735 (D. Mass. 1814) (opinion of Story, Cir. Justice); *Boston Water Power Co. v. Gray*, 47 MASS. 131, 166 (1822); *Greenough v. Rolfe*, 4 N.H. 357, 359 (1828); *Estes v. Mansfield*, 88 MASS. 69 (1863); *Sanborn v. Murphy*, 50 N.H. 65, 67 (1870); *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 399-400 (1875); *Utah Constr. Co. v. Western Pacific R'y Co.*, 162 P. 631, 633 (Cal. 1917); Cf. *Evans v. Hudson Coal Co.*, 165 F. 2d 970, 974 (3rd Cir. 1948).

Most recent in this line of authorities is a 1969 California case which arose under a statutory scheme which contemplated that certain types of liability insurance disputes be resolved by contractual arbitration, but also required that the arbitrators decide such disputes on the basis of the parties' "legal entitlement" to recovery under applicable tort law. Since the award contained a brief statement of the arbitrator's reasons for the award the court was able to determine that the award was based upon a misunderstanding of California law regarding imputation of negligence.

The insurance company contended that an arbitrator's error of law is no basis for vacating or refusing to enforce his award, and cited many authorities ("unrestricted submission" cases arising out of contract disputes) which appeared to support that contention. However, the appellate court had no difficulty in distinguishing the arbitration under review from an arbitration in which the arbitrator had been under no

It is argued that a rule generally prohibiting such review would foster the speedy and economical resolution of the dispute, which was the parties' presumed objective in agreeing to arbitration. But this argument cannot be used to defend judicial enforcement of an award, rendered under a pre-dispute arbitration agreement, which reflects error in the application or interpretation of the substantive law governing non-waivable statutory rights. If, for example, an investor's effectual waiver of the right to have prospective securities-law claims resolved in accordance with governing securities statues would foster economy, speed, and finality, his outright waiver of prospective securities claims would be still cheaper, faster and more final.

While 9 U.S.C. § 10 (a) (4) "excess of authority" analysis is probably the most logical basis for judicial review of the correctness of the arbitrators' interpretation of the law in cases in which the arbitrators were bound to resolve the dispute in accordance with the law, there is also authority supporting use of "undue means" language identical to that found in 9 U.S.C. § 10 (a) (1) — the same provision relied upon by the district court in this case — for the same purpose. *Local Union 560 v. Eazor Express, Inc.*, 230 A. 2D 521, 525 (N.J. App. 1967); *Collingswood Hosiery Mills v. American Federation of Labor*, 107 A. 2D 43, 44 (N.J. App. 1954).

Both the Second Circuit decision reversed in *Wilko* and Justice Frankfurter's *Wilko* dissent reflect the view that 9 U.S.C. § 10 would authorize the district court to inquire into the arbitral tribunal's application and

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constraint to decide in conformity with the rules of law. The award was vacated because of the arbitrator's apparent legal error. *Allen v. Interinsurance Exchange of the Automobile Club of Southern California*, 80 CAL. RPTR. 247, 249-50 (App. 1969).

interpretation of substantive securities law, and to vacate the award if the dispute submitted to arbitration had not been resolved in accordance with controlling statutory law, but neither specifies the particular subsection of 9 U.S.C. § 10 which would be relied upon as the statutory basis for such review.

Ultimately, the attempt to identify particular authority in the words of § 10 is probably irrelevant. The Securities Act of 1933 and Securities Exchange Act of 1934 were specific, *later* enactments which not only prescribed substantive standards of conduct but voided contracts purporting to waive compliance with those standards. In working out the implications of this subsequent legislation for contractual arbitration arising out of alleged violation of those standards, and for judicial review of awards arising out of such arbitration, it is the Federal Arbitration Act of 1925 which must give way, to the extent of any conflict.

It must not be forgotten that the suppression of securities fraud and of the use of manipulative or deceptive practices in the sale of securities is a matter of strong public policy. In the Thirties Congress acted to reform common law rules such as *caveat emptor* as applied to the securities field, in pursuit of a strong public policy of ensuring fairness and integrity in the nation's capital markets. In the Sixties and Seventies, Congress acted to impinge upon even such principles as freedom of association and delectation of persons, in pursuit of a strong public policy of ensuring fairness and dignity for workers regardless of race or sex. Surely the policy goals which underlay the reform of securities law are no less "strong" today? Surely "strong public policy" is not a code phrase for the "public policy of the month"?

But if this be granted, how could one explain to Mr. and Mrs. McCollough that they can have no remedy, even though their arbitrators did *not* find that no securities fraud had been practiced upon them and did *not* find that they waived their securities-law claims with actual knowledge of them, while a discharged employee may not be reinstated — despite an award in his favor — unless his arbitrator *does* find that he has not engaged in sexual harassment? See *Stroehmann Bakeries v. Local 776*, 969 F. 2D 1436, 1441 (3rd Cir. 1992) and *Newsday v. Long Island Typographical Union*, 915 F. 2D 840, 843-44 (2nd Cir. 1990), both citing *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S.CT. 2177, 2183, 76 L.Ed. 2d 298 (1983). If the arbitrators in this case did give effect to the "note and release," then clearly the note and release is "a contract [which,] as interpreted by [the arbitrators] violates some explicit public policy" — viz., the policy against unknowing waiver of securities rights, as expounded in *Burgess v. Premier Corp.*, 727 F. 2D 826, 831 (9th Cir. 1984), *Childs v. RIC Group, Inc.*, 331 F. SUPP. 1078, 1083 (N.D. Ga. 1970), *Pearlstein v. Scudder & Germain*, 429 F. 2D 1136, 1142-43 (2nd Cir. 1970), *cert. denied* 401 U.S. 1013 (1971) and numerous other authorities. How, then, consistently with *W.R. Grace and Co. v. Local Union 759*, supra, can the federal courts enforce the award?

There is a fundamental difference between an arbitration in which the arbitrators are free to make up the substantive rules of decision, and one in which they are bound to resolve the dispute in accordance with applicable statutory law. Investors submit that a clear recognition of this difference, and of its specific implications for judicial review of awards rendered in securities cases submitted to arbitration under *Mitsubishi-McMahon-Rodriguez de*

Quijas, is necessary. There is no reason to believe that the arbitration of securities disputes could not survive as a valuable alternative to litigation if such awards were subject to similar scrutiny, at the enforcement stage, as is currently exercised with respect to labor arbitration awards. To subject securities arbitration awards to the same expectations with regard to reasoned support, and the same requirements vis-a-vis consistency with strong public policies, as are currently applied with respect to labor arbitration awards, would not "doom" or "throttle" securities arbitration.

III. SINCE "APPROPRIATE MEANS FOR JUDICIAL SCRUTINY MUST BE IMPLIED," WHERE AN AWARD IS NOT SUPPORTED BY A REASONED DECISION AND THE ARBITRAL RECORD STRONGLY SUGGESTS THAT THE AWARD WAS INFLUENCED BY LEGAL ERROR, THE DISTRICT COURT MUST BE FREE TO VACATE THE AWARD.

The traditional rule that an award may be vacated where arbitrators intended to follow, but misconstrued, applicable law has been noticed above. In considering cases in which that rule was invoked, the courts have long held that

> where the reasons of the award are not shown, there is no means of knowing whether or not the arbitrators intended to decide according to law. 6 C.J.S. *Arbitration* § 155 (1975).

It is for this reason that various institutions promoting the arbitral resolution of disputes actively discourage arbitrators from stating findings and conclusions or otherwise giving any reasons or explanations for their

awards — arbitrators are frankly advised that stating any reasons for their award may create a basis for a court challenge to the award.

In the context of a proceeding such as the one under review in this case, however, in which, despite the silence of the agreement, the arbitrators were bound to decide according to law (and especially where, as here, they were never explicitly instructed to do so), the implications of such "politic silence" are entirely different. Without a reasoned opinion, there is "no means of knowing whether or not the arbitrators intended to decide according to law," much less whether they did so.

Although it is the general rule that arbitrators need not explain their decision,

> [n]onetheless, the extent of an arbitrator's obligation to explain the award is necessarily related to the scope of judicial review of it. *Sobel v. Hertz, Warner & Co.*, 469 F. 2D 1211, 1214 (2nd Cir. 1972).

This principle has not yet been explicitly applied in the newly-opened field of securities arbitration under *Mitsubishi-McMahon-Rodriguez de Quijas*.[5]

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5. In *Mitsubishi* the prospect of substantive review of arbitral proceedings at the award-enforcement stage was very obliquely addressed, and then only in the context of a basic choice-of-law determination in an international commercial arbitration. Nonetheless, the Court pointed to the arbitral tribunal's rule requiring a reasoned decision as one of the factors ensuring that effective judicial review would be possible. 473 U.S. at 638, 105 S.CT. at 3360, n. 20.

Perhaps the nearest analog to the enforcement/vacatur proceeding arising out of a *Mitsubishi-McMahon-Rodriguez de Quijas* securities arbitration is the Administrative Procedures Act review case. In each instance, an expert panel utilizing relatively informal procedures and entitled to draw upon its own specialized knowledge has rendered a determination on a particular matter in controversy, and the reviewing

IV. BROKER'S EXTENSIVE RELIANCE ON ITS INVALID "NOTE AND RELEASE" DEFENSE JUSTIFIES THE DISTRICT COURT'S REFUSAL TO ENFORCE THE ARBITRATION AWARD.

In the entire history of this case, no authority has ever been cited which supports the proposition that, *where the arbitrators were bound to decide in accordance with the law*, their award is entitled to judicial enforcement even if it is legally erroneous. Nevertheless, this proposition has clearly been adopted by the Court of Appeals. Therefore, the Court of Appeals never considered in what manner such error must be shown.

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court, while giving due deference to the quasi-judicial panel's findings of fact and its expertise, must determine whether the panel has resolved the disputed matter in accordance with controlling substantive law. In the APA context, as a corollary to the court's duty to review the agency determination for correct interpretation of applicable law, the agency's ruling must include adequate explanation to enable the court to ascertain the legal reasoning supporting the agency decision. *Int'l Longshoremen's Ass'n v. National Mediation Board*, 870 F. 2D 733, 735 (D.C. Cir. 1989). "Where an agency undertakes administrative action without stating reasons therefor, a court may set aside such action." *Bacon v. Dep't of Housing and Urban Development*, 757 F. 2D 265, 269 (9th Cir. 1985) (dictum).

Similarly, reasoned decisions are the norm in the field of labor arbitration. Because a labor arbitrator's interpretation of the collective bargaining agreement is open to a degree of substantive review at the judicial enforcement stage, it has been recognized that labor contract arbitral tribunals "have a duty to ... give reasons clearly, if briefly, justifying their decisions." Harvill v. Roadway Express, Inc., 640 F. 2d 167, 169-70 (8th Cir., 1981).i.Cases:Harvill v. Roadway Express, Inc., 640 F. 2d 167 (8th Cir., 1981);; Vulcan-Hart Corp. v. Stove, Furnace & Allied App. Workers, 516 F. Supp. 394, 395 (E.D. Mo. 1981), affirmed 617 F. 2d 1182 (8th Cir. 1982).i.Cases:Vulcan-Hart Corp. v. Stove, Furnace & Allied App. Workers, 516 F. Supp. 394 (E.D. Mo. 1981), affirmed 617 F. 2d 1182 (8th Cir. 1982);.

In the district court, Investors sought vacatur of the arbitral award on "undue means" grounds, citing four illegal arguments urged upon the panel by Broker's counsel. Specifically, Investors claimed that Broker had misrepresented the law to the arbitrators when it argued: (1.) that contributory negligence would be a defense to Appellee's claims under Arizona securities law; (2.) that under Arizona securities law Broker would have a "good faith" defense to the claims based upon alleged misconduct of Investors' account representative, Broker's employee; (3.) that Investors could have no private right of action under the Arizona Consumer Fraud Act if the alleged misconduct was also violative of Arizona securities statutes; and (4.) that even if Broker had been liable to pay damages to Investors under state or federal securities statutes or otherwise, the "note and release" which Broker procured from Investors was a binding and effectual waiver of any such claim.

The district court found that two of these arguments (to wit, nos. (1) and (3)), asserted in Broker's formal written Answer filed in the arbitration proceeding, were so clearly inconsistent with applicable law that Broker knew or should have known that they were groundless. "Raising multiple facially meritless defenses," the district court concluded, "constitutes procurement of an award by 'undue means' within the meaning of 9 U.S.C. § 10 (a)."[6]

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6. Broker's conduct in this case was especially "undue." First, by asserting defenses which they knew or should have known to be invalid, Broker's counsel breached their duty of candor toward the arbitral tribunal. Rules of the Arizona Supreme Court, R. 42, ER 3.3 (1), provides that an attorney "shall not knowingly make a false statement of law to a tribunal." Second, the impact of Broker's misstatements of Arizona securities law was aggravated by Broker's vigorous and successful objection to Investors' offer of Mr. Matthew Zale, former

On appeal, while maintaining that this conclusion is correct as far as it goes, Investors contended that the district court's review of the award for error in the application or interpretation of securities law: (1.) was not limited to Broker's "facially groundless" defenses; and (2.) was not limited to defenses which Broker "knew or should have known" to be illegal. Since it is clear that legally invalid defenses were invoked by Broker, and since no reasons were given for the arbitrators' decision, whether the award was influenced by Broker's illegal arguments is a question of fact. The record before the district court was more than adequate to support its concern that the award probably reflected, at least in part, the erroneous contentions urged by Broker. Broker never attempted to show that the district court's factual inference was "clearly erroneous."

In its appellate brief, Broker itself confirmed the critical impact of at least one of Broker's misrepresentations of securities law:

> The real issue was the enforceability of the note and release and the viability of the Investors' factual allegations. The panel rejected the Investors' position but adopted A.G. Edwards' position that the note and release were valid. Respondent's Ninth Circuit Opening Brief, p. 22.

At the arbitration hearing, Broker's contention regarding the note was clear and simple: the note which Broker had Investors sign, promising payment of the negative account balance which resulted from their "Black Monday" loss, contained a boilerplate "release of claims," this release language constituted an effectual waiver of Investors'

Director of the Securities Division of the Arizona Corporation Commission, as an expert witness on Arizona securities law.

statutory claims, and because the note was executed after the transactions Investors complain of had been completed, statutory and other restrictions on prospective waiver of such claims are ineffectual to invalidate this waiver. In final arguments at the close of the arbitration hearing, Broker's counsel heavily stressed the purportedly dispositive effect of the release language contained in the note.

The problem with this argument is that waiver is a voluntary and intentional relinquishment of a *known* right, and in the context of alleged violation of securities statutes this has been held to require actual knowledge of the existence of the statutory claim purportedly waived:

> A release is valid for purposes of federal securities claims only if the [plaintiffs] had "actual knowledge" that the claim existed. *Burgess v. Premier Corp.*, 727 F. 2D 826, 831 (9th Cir. 1984).

> [T]o support a finding of waiver [of private civil remedy for alleged violations of Securities Exchange Act of 1934], it must be found that the particular statutory right was actually known. *Childs v. RIC Group, Inc.*, 331 F. SUPP. 1078, 1083 (N.D. Ga. 1970).

> [A]s to general releases obtained prior to the initiation of litigation, there is no informed release if the prospective plaintiff is unaware of the violations of federal securities law and/or that he is releasing claims under the federal securities law. 3A H.S. Bloomenthal, SECURITIES AND FEDERAL CORPORATE LAW, § 8.30 [1] (1991 Rev.).

Cf. *Pearlstein v. Scudder & Germain*, 429 F. 2D 1136, 1142-43 (2nd Cir. 1970), *cert. denied* 401 U.S. 1013 (1971). This point was clearly raised by Investors in response to Broker's "note and release" defense.[7]

Broker never attempted to prove, or even to argue, that Investors had knowledge of a securities violation, or any idea of their rights under the securities statutes, at the time Broker induced them to sign the "note and release." Broker simply asserted repeatedly that the release was valid because it was executed after the allegedly improper transactions had been completed and (obviously) after Investors learned of their loss. Broker never tried to reconcile this defense with case law under the securities statutes.

The note and release defense may not have been "facially invalid" in the sense that it could not have

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7. As Investors also pointed out, Broker's affirmative defense based on the "note and release" would have been invalid as a matter of applicable securities law even disregarding the § 29 (a) anti-waiver provision. Under § 29 (b) of the Securities Exchange Act of 1934:

> Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract . . . the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void . . . . 15 U.S.C. § 78cc (b).

Assuming, as an affirmative defense must assume, that the debit balance of Investors' account and Investors' consequent debtor relationship to Broker was the result of Broker's conduct in violation of securities law, the note prepared to evidence that indebtedness (and the "release" contained therein) would have been void under this statute. Cf. ***Regional Properties, Inc. v. Financial and Real Estate Consulting Co.***, 678 F. 2d 552, 558-60 (5th Cir. 1982); ***Pearlstein v. Scudder & Germain, 429 F. 2d 1136 (2d Cir. 1970), cert. denied 401 U.S. 1013 (1971).***

constituted a defense to Investors' claims under any set of facts, but it clearly was invalid in light of the total absence of proof that Investors actually knew of and intended to release statutory securities claims. Since it was heavily stressed by Broker from the beginning to the end of the arbitral proceeding, and since even Broker affirms the crucial importance of this contention in bringing about the arbitral result, it would certainly take a leap of faith to conclude that the arbitrators' unexplained, one-sentence award was not at least in some part based upon this invalid defense.

There can be no question that, if the arbitration hearing had been a jury trial, the submission of the note and release defense to the jury over Investors' objection would have constituted reversible error, in the event of a general verdict in Broker's favor. It is interesting to note that *Wilko* also involved broker-dealer's potential waiver defense, based on boilerplate provisions of the brokerage contract. There, however, by resisting arbitration the investors procured broker-dealer's concession of the invalidity of this defense, leading the Court of Appeals to remark: "The exculpatory provision [of the brokerage contract] is concededly invalid. Hence no question as to it will be submitted to the arbitrators." 201 F. 2D at 444.

Now this Court has aligned itself with the Second Circuit's approach to *Wilko*, and in this case Broker, which was compelled to make no concessions before entering the arbitration room, not only invoked but emphasized its waiver defense based upon the note and release — even though it now makes no attempt to reconcile that defense with applicable securities law. If, under a rule permitting enforcement of a pre-dispute agreement to arbitrate statutory tort claims, appropriate means for judicial scrutiny must be implied, whereby resolution of the

dispute in accordance with controlling statutory law will appear, or want of it will upset the award, then surely such "appropriate means" must include an intelligent inference that the award was probably influenced by a legally invalid defense which was strongly urged upon the arbitrators by attorneys representing a national securities dealer.

Otherwise, a brokerage contract provision which reads:

> The parties agree that any claim arising out af any alleged violation of any state or federal securities statute shall be submitted to arbitration.

would, in order to provide full disclosure to the lay investor, have to be rewritten as:

> The parties agree that any claim arising out af any alleged violation of any state or federal securities statute shall be submitted to arbitration. The arbitrator may disregard state and federal securities statutes in resolving such claim. By agreeing to this provision, Investor may be waiving substantive rights which he could not waive in any other manner.

RESPECTFULLY SUBMITTED this 26 day of October, 1991.

BEGAM LEWIS MARKS WOLFE & DASSE

By: _____
Frank Lewis

BRIAN K. STANLEY

_____

Attorneys for Petitioners McCollough

APPENDIX

Pursuant to Supreme Court Rule 14 (k)

(967 F. 2D 1401)

A.G. EDWARDS & SONS, INC.,
a Delaware corporation, Plaintiff-Appellant,
v.
William F. McCOLLOUGH and Jeanene
MCCOLLOUGH, husband and wife,
Defendants-Appellees.

No. 91-15839.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 9, 1992.
Decided June 26, 1992.

Brokerage firm applied for order confirming arbitration award in securities matter, and investors moved to vacate award or for alternative relief. The United States District Court for the District of Arizona, Paul G. Rosenblatt, J., 764 F.Supp. 1365, denied the application and vacated the award and remanded the matter for a new hearing. Firm appealed. The Court of Appeals held that investors were not entitled to vacation of the award on ground that award was secured through undue means because two of defenses put forth by firm were sufficiently meritless to constitute undue means.

Reversed.

Charles W. Herf, Quarles & Brady & Fannin, Phoenix, Ariz., for plaintiff-appellant.

Brian K. Stanley, and Frank Lewis, Langerman, Begam, Lewis & Marks, Phoenix, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before: BROWNING, PREGERSON, and RYMER, Circuit Judges.

PER CURIAM:

A.G. Edwards & Sons appeals the district court's order vacating an arbitration award against the McColloughs. We reverse and remand.

I

The McColloughs, investors, agreed to arbitration in lieu of a federal court suit to resolve a dispute with their brokers, Edwards & Sons, as to the cause of a considerable loss in their account. The McColloughs then filed with the New York Stock Exchange Director of Arbitration, their complaint alleging in conclusory fashion violation of federal and Arizona RICO, securities, and Consumer Protection statutes. Edwards & Sons answered, raising fourteen affirmative defenses, two of which the district court below found facially meritless. The McColloughs responded by filing a brief which sought to rebut these defenses, and specifically argued that the two defenses in question were without merit. At the close of arbitration, the panel found in favor of Edwards & Sons and awarded the firm $310,850.12. The panel did not state the reasons for its award.

The brokers filed an Application to Confirm Arbitrator's Award in federal court in Arizona. In response, the McColloughs moved to vacate the award or to remand for a statement of reasons.

The district court rejected the McColloughs' argument that the arbitrators were guilty of misconduct in refusing to hear material evidence. It also rejected their argument that the award was procured through fraud because Edwards & Sons made knowing misstatements of the law by raising the meritless defenses. The court noted that federal courts must be slow to vacate an arbitral award on the grounds of fraud and that fraud is only a

viable ground for vacatur when it is undiscoverable during the proceeding. The Court held the McColloughs failed to make out fraud because all the alleged misstatements had been pointed out to the arbitrators. The court also rejected the McColloughs' motion to remand for a statement of reasons, finding it well settled that arbitrators are not required to state their reasons.

The court did, however, accept the McColloughs' third argument for vacatur — that the award was procured through "undue means" within the meaning of 9 U.S.C. § 10(a)(1). The McColloughs argued that two of the defenses put forth by Edwards & Sons were so facially meritless that to offer them was to engage in "undue means." The court agreed, finding that such behavior constituted grounds for vacatur. The court then remanded the case to a different arbitration panel.

II

As the district court noted, federal court review of arbitration awards is extremely limited. "It is generally held that an arbitration award will not be set aside unless it evidences a 'manifest disregard for law.' " Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir.1991) (citing "Steelworkers Trilogy"). The courts should not reverse even in the face of erroneous interpretations of the law. Id.

The district court did not state whether (1) in the face of a lack of findings, it would presume the arbitrators had been persuaded by the meritless defenses; or (2) the mere act of putting forth the arguments, whether they were relied upon or not, constituted "undue means." In either case, the court's decision is in conflict with the law of this circuit.

If the district court employed a presumption that the meritless defenses had an impact on the arbitrator's decision, its holding is in obvious tension with the applicable case law. As the district court recognized, arbitrators are not required to state the reasons for their decisions. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); Kaiser Cement Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1102 n. 6 (9th Cir.1986). The rule that arbitrators need not state their reasons presumes the arbitrators took a permissible route to the award where one exists. See Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C.Cir.1989). Under the district court's rationale in this case, courts would be free to vacate an award in any case in which the winning side had raised even one meritless defense and the arbitrators had not specifically identified the reasons for their award. Panels of arbitrators wishing to avoid relitigation would be forced to state the reasons for their decisions in direct contradiction of the universally accepted rule that a statement of reasons is not required and arbitrators are presumed to have relied on permissible grounds. See United Steelworkers, 363 U.S. at 598, 80 S.Ct. at 1361.

If the district court meant to hold that no reliance by the arbitrators on the meritless arguments need be demonstrated because the mere offering of the defenses itself constitutes "undue means," its holding conflicts with the language of s 10 and cases interpreting it. The statute allows for vacation of an award "procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Thus the statute requires a showing that the undue means caused the award to be given. Cf. Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir.1990) (the

statutory language requires a nexus between the alleged fraud and the basis for the panel's decision).

Nor do we agree with the district court that mere sloppy or overzealous lawyering constitutes "undue means."[1] Although the term has not been defined in any federal case of which we are aware, it clearly connotes behavior that is immoral if not illegal. See Black's Law Dictionary 1697 (Rev. 4th ed. 1968) ("Undue" means "more than necessary; not proper; illegal," and "denotes something wrong, according to the standard of morals which the law enforces." "Undue influence" means any "improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered."). Offering a meritless defense, however unfortunate, is part and parcel of the business of litigation; it carries no connotation of wrongfulness or immorality. In addition, it occurs with such frequency that, were the district court's rule to be adopted, the federal courts would be required to overturn arbitration awards regularly as procured by "undue means." This would be inconsistent with the extremely limited scope of judicial review of such awards.[2]

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1. The McColloughs now argue that the district court should have relied on the "excess of authority" provision of 9 U.S.C. § 10(a)(4) to support its holding. We agree with the D.C. Circuit that, in the absence of any evidence that the arbitrators "exceeded their powers," the failure to provide reasons does not justify overturning an award under this section.

See Sargent, 882 F.2d at 532.

2. Appellee's various policy arguments urging tighter judicial review of arbitration awards are not persuasive. Such a course would undermine the strong federal policy encouraging arbitration as a "prompt, economical and adequate" method of dispute resolution for those who agree to it. See Rodriguez de Quijas v. Shearson/American

Moreover, the McColloughs have not satisfied the first part of this court's three part test for vacating an arbitration award under 9 U.S.C. § 10(a). We have held that, in order to justify vacating an award because of fraud, the party seeking vacation must show that the fraud was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir.1986) (citing Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir.), cert. denied, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982)). We see no reason not to apply this test to cases raising claims of "undue influence."

An obvious corollary to the first prong of the test stated above is that, where the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite at the apple. This rule is consistent with "the extremely narrow scope of our review of the arbitration panel's decision." Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1485 (9th Cir.1991).

In this case, the alleged "undue means" — the assertion of facially meritless defenses — were known to the McColloughs and the arbitrators from the outset of the arbitration. In fact, as mentioned above, in discussing and rejecting the McColloughs' fraud argument, the district court concluded that "all the alleged 'misstatements' (of the law) were known to, and pointed

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Express, Inc., 490 U.S. 477, 479-80, 481, 109 S.Ct. 1917, 1919-20, 1920, 104 L.Ed.2d 526 (1989).

out to the arbitrators by, (the McColloughs') counsel," and thus that the requirement that the fraud must not have been discoverable upon the exercise of due diligence was not satisfied. A.G. Edwards & Sons v. McCullough, 764 F.Supp. 1365, 1370 (D.Ariz.1991).

The decision vacating the arbitration award is REVERSED. The district court shall enter an order confirming the arbitration award. The appellant is entitled to attorneys' fees in accordance with the agreements between the parties.

(764 F. SUPP. 1365)

A.G. EDWARDS & SONS, INC., a Delaware corporation, Plaintiff,
v.
William F. McCULLOUGH and Jeanene McCullough, husband and wife, Defendants.

Misc. No. M90-129-PHX-PGR.
United States District Court,
D. Arizona.
April 30, 1991.

Brokerage firm applied for order confirming arbitration award in securities matter, and investors moved to vacate award or for alternative relief. The District Court, Rosenblatt, J., held that: (1) arbitrators did not have to hear testimony of investors' legal expert and had discretion on how to receive proof of "foreign law"; (2) investors were not entitled to vacatur of award on basis of fraud; (3) brokerage firm's conduct in raising multiple facially meritless defenses constituted procurement of award by "undue means"; and (4) case would not be remanded to panel for statement of their reasons for award.

Plaintiffs' application denied, defendants' motion granted, and matter remanded for new hearing.

Charles W. Herf, Phoenix, Ariz., for plaintiff.

Frank Lewis, Phoenix, Ariz., for defendants.

MEMORANDUM AND ORDER

ROSENBLATT, District Judge.

Before the Court is Plaintiff's application for an order confirming an arbitration award and Defendants' motion to vacate the arbitration award or for alternative relief.

After reviewing the moving papers, the record, and the applicable law, and after hearing oral argument, the court finds it appropriate to deny Plaintiff's application and to grant Defendants' motion to vacate the arbitrators' award.

I. FACTS

Defendants, a couple in their 60's, asserted claims against Plaintiff, their stockbroker's employer, complaining that trading high risk "naked options" for their account was not in accordance with Defendants' stated investment objective of "safety of principal." The stock market "crash" of 1987 resulted in Defendants losing the equity position in their account of approximately $750,000 and incurring a liability (a "debit" balance) to Plaintiff for approximately another $250,000, for a total loss of approximately $1,000,000.

Plaintiff's in-house counsel (David Minnick) secured a promissory note from Defendants for the $250,000 "debit" balance in the account. The note contained a clause releasing any and all claims against Plaintiff. Minnick did not inform Defendants that they might have a claim against Plaintiff. Defendants made at least two payments. Subsequently, Defendants retained counsel and made a Statement of Claim to the New York Stock Exchange on October 14, 1988. The parties participated in arbitration pursuant to the arbitration clause in their contract. That proceeding resulted in an award whereby Defendants took nothing and their liability to Plaintiff was upheld.

Defendants' claims were based on violations of federal and state securities and RICO laws, and state consumer fraud laws. (Id.). The arbitrators gave no reasons for their decision.

II. DISCUSSION

A. Standard of Review

A. Standard of Review

(1) Federal court review of arbitration awards is limited and courts are permitted to make only a "restricted review" of arbitral decisions. E.g., Rostad & Rostad Corp. v. Investment Management & Research, Inc., 923 F.2d 694 (9th Cir.1991) (citation omitted); Northrop Corp. v. Triad Int'l Mktg., S.A., 811 F.2d 1265, 1269 (9th Cir.), cert. denied, 484 U.S. 914, 108 S.Ct. 261, 98 L.Ed.2d 219 (1987); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902 (9th Cir.1986).

B. Grounds for Vacatur

(2) The bases for vacating an arbitration award are limited to (1) those provided in 9 U.S.C. § 10(a)-(d); and (2) perhaps the judicially created "manifest disregard of the law" doctrine. See Rostad, 923 F.2d at 697. (observing that there is "some doubt" whether manifest disregard of the law remains a viable basis for vacating an award after Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526 (1989)); Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir.1990). Defendants offer two statutory bases for vacating the award:

Where the arbitrators were guilty of misconduct in refusing to . . . hear evidence pertinent and material to the controversy.

9 U.S.C. § 10(c); and

Where the award was procured by corruption, fraud, or undue means.

Id. § 10(a).

1. 9 U.S.C. § 10(c)

Defendants' Motion to Vacate asserts that the arbitrators refused to hear the testimony of their expert on

the applicable Arizona law. Defendants point to four (4) "misstatements" of law offered by Plaintiff's counsel, and cite authority for the position advanced by Defendants as evidence of the "misstatements." Defendants then argue that "if the arbitrators accepted as correct any one of the four misstatements ... they would have incorrectly believed that they had to find against (Defendants) even if (Defendants) had proved their case of securities fraud." Defendants complain that because the arbitrators gave no reasons for their decision they cannot determine whether they did, in fact, accept any of the "misstatements" as correct.

Plaintiff responds by arguing that the arbitrators requested, and received, legal briefs on the applicable law from both parties, and that Defendants presented their legal theories in argument before the panel. Plaintiff also asserts that the panels' refusal to hear the expert was a correct evidentiary ruling, citing cases holding that legal experts may not testify as to meaning and applicability of securities laws. Until oral argument, Plaintiff did not address the "misstatements" except to state it would not "waste( )" the court's time with arguing "which party advanced the appropriate legal theories."

a. Arbitrators' Discretion in Receiving Evidence

(3)(4) Vacatur of an award for refusing to hear evidence is rare. Ouziel v. Shearson Lehman Bros., Inc., No. CV 86-1822 (RJD) (E.D.N.Y. April 11, 1988) (1988 WL 36933, *2, 1988 U.S. Dist. LEXIS 3037, *4) (citing Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir.1985) (arbitrator not bound to hear all evidence tendered, but must allow "adequate opportunity" to present evidence and arguments)). The arbitrator is the

judge of admissibility and relevancy of evidence. Hoteles Condado, 763 F.2d at 39 (citation omitted). While the arbitrators might err in determining relevance, every failure to receive evidence does not require vacation of an award. Fairchild & Co. v. Richmond, F. & P.R.R., 516 F.Supp. 1305, 1314 (D.D.C.1981).

The error which would constitute misconduct so as to justify vacating an award must not simply be an error of law, but one which so affects the rights of a party that it may be said to deprive him of a fair hearing.

Id. (emphasis added) (citation omitted).

Fairchild was a contract dispute which involved, in part, an objection that the arbitrators had not permitted testimony by a lay witness about his "legal opinions." Id. The court found that the arbitrators did not err by restricting inquiry into the witness' legal opinions because it "could be viewed as unnecessary and a matter best left to the arguments of counsel." Id.

While Fairchild did not involve testimony by an "expert" on legal issues, it is sufficiently analogous to the instant action to suggest that the arbitrators were not required to hear the Defendants' legal expert. Plaintiff cites cases holding that expert testimony must not amount to a legal conclusion, and argue that the arbitrators made a correct evidentiary ruling. These cases, while perhaps informative, are inapposite because arbitrators are not required to follow legal rules of evidence. E.g., Quziel, 1988 WL 36933, at *2, 1988 U.S. Dist. LEXIS 3037 at *4 (citation omitted) (evidence of settlement offer, while inadmissible in court, was admissible in arbitration where rules of evidence are inapplicable); Fairchild, 516 F.Supp. at 1315 (rules of evidence not binding in arbitration) (citation omitted).

In Hoteles Condado, cited by Defendants in support of vacatur, the First Circuit affirmed a district court's vacatur of an award where the arbitrator "effectively denied the Company an opportunity to present any evidence in the arbitration proceeding." 763 F.2d at 40 (emphasis added). Here, Defendants were not denied an opportunity to present any evidence, assuming that the briefs are considered "evidence" of the law. The facts here are not so compelling as Hoteles Condado, and it is thus not persuasive.

Defendants' Reply Memorandum characterizes the excluded testimony as one of "fact" and not law by analogizing choice-of-law principles. Defendants argue that because there is no judge in an arbitration to declare the "law of the forum," all law is "foreign" and is to be proved as a "fact" as in any judicial proceeding involving foreign law. Defendants assert that the refusal of the arbitrators to hear their expert deprived them of the opportunity to prove the "fact" of the "law." Defendants' argument does not appear to be well supported, indeed, they cite no authority other than American Jurisprudence. A compact discussion of this issue is contained in a Washington case:

The admission and consideration of foreign law should be subject to the control of the trial judge, free to consider in his discretion any source or material which he deems relevant to the determination of the issue.... The determination of foreign law is not to be made by the jury.... When the evidence is in, the foreign law that has been proved as a fact assumes a new role and becomes law.

Byrne v. Cooper, 11 Wash.App. 549, 523 P.2d 1216 (1974). The Byrne court explained that while foreign law

is proved as a "fact," it is not a true fact except in the procedural manner of its proof. Ultimately "foreign" law is an issue of law. Id.

Defendants' semantic argument that they were prevented from proving the "fact" of the "law" is not persuasive because a court (and presumably an arbitration panel) has discretion to determine what source or material is relevant to determining "foreign" law. See id. See generally E. Scoles & P. Hay, Conflict of Laws 403-14 (1982). Arbitrators are not bound by a court's rules of procedure just as they are not bound by rules of evidence. E.g., Forsythe, 915 F.2d at 1022 (citing Wilko v. Swan, 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953), overruled on other grounds, Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989)). Parties, absent agreement, cannot impose rigorous procedural standards in a proceeding that is designed to avoid such formalities. Id.; Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 744 (9th Cir.1985) (procedural matters "become part of the bundle of issues committed to decisions by the arbitrator"). Therefore, the arbitrators' had discretion to decide how to receive proof of the "foreign" law. Choosing to rely on briefs and the arguments of counsel does not appear to be an abuse of that discretion, even if a district court could apply such a standard of review to arbitration awards.

b. The "Fair Hearing" Requirement

(7) Because the arbitrators' decision not to hear Defendants' expert was within their discretion, to prevail on this argument Defendants must demonstrate that they were deprived of a fair hearing. Hoteles Condado, 763 F.2d at 40; Fairchild, 516 F.Supp. at 1314. Defendants

have not so shown. Defendants supplied a legal memorandum to the arbitrators. Defendants' counsel advanced his view of the applicable law at the hearing. Arbitrator Marsh (the practicing Arizona attorney that voted for Defendants) stated "I also feel that (Defendants' expert) is not the ultimate authority as to what the law is." Arbitrator Marsh asked Defendants' counsel for citations to specific statutes and cases that Defendants wanted the panel to consider. Defendants' counsel acknowledged that the arbitrators, if they heard the expert, were "free to accept or reject" the testimony. Arbitrator Lehing (the non-practicing attorney that voted against Defendants) stated that the panel was "perfectly capable of reading the statutes and the case law." The third arbitrator (a non-attorney) apparently made no comments on the issue. Thus, from the record it appears that the two lawyers on the panel decided not to hear the testimony of Defendants' expert. The panel requested briefs from counsel to address "all of those issues."

Defendants' twenty-five page legal memorandum is undated; however, at page 19, first paragraph, the memorandum implies that it was prepared before the conclusion of the hearing. It is not clear if Defendants provided citations to specific statutes and cases, at the conclusion of the hearing, as requested by Arbitrator Marsh. Defendants may have voluntarily foregone this opportunity to present their legal position in the form requested by the panel (written briefs at hearing conclusion), and now should be held to have waived the right to object to the arbitrators' refusal to hear the evidence in the form Defendants desired (expert testimony).

In sum, it appears that the Defendants had an adequate opportunity to present their legal theories to the

panel. It does not appear that Defendants were "deprived of a fair hearing" by the refusal of the arbitrators to hear Defendant's expert.

However, the court is troubled by certain facially meritless defenses raised by Plaintiff at the arbitration proceeding. While the Court concludes that the arbitration panel was not required to hear Defendants' expert to provide a "fair" hearing, the parties are not free to raise obviously improper or frivolous claims or defenses.

2. 9 U.S.C. § 10(a)

Defendants' Reply Memorandum raises "fraud" and "undue means" as additional bases for vacating the award. Defendants raise "knowing misrepresentation to the tribunal of the applicable law" as the "fraud" element; and assert that if the "misstatements" were unknowingly made they constitute "undue means." Defendants raise this after noting that Plaintiff did not respond to the allegations of misstatements of law, except to attach a copy of the two memorandums submitted to the arbitrators. Defendants suggest it is appropriate to consider the Plaintiff to have admitted the "misstatements." (Id.). After hearing oral argument on the issue, the Court agrees that Plaintiff has admitted at least two of the four alleged "misstatements."

a. Vacatur on Ground of Fraud

(8)(9) "(C)ourts must be slow to vacate an arbitral award on the ground of fraud." Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir.), cert. denied, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982). Courts require a nexus between the alleged fraud and the panels' decision. E.g., Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir.1990) (and cases cited therein). Where the panel hears the allegation of fraud, then

decides the controversy on clearly independent grounds, the award should not be vacated. Id. The Eleventh Circuit has recently held that to prevail on a motion to vacate an award based on fraud, the movant must meet three requirements:

1. Establish fraud by clear and convincing evidence;

2. The fraud must not have been discoverable upon the exercise of due diligence prior to or during the hearing; and

3. The fraud is materially related to an issue in the arbitration.

O.R. Secs., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742, 748 (11th Cir.1988) (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir.1988)); accord Dogherra, 679 F.2d at 1297.

In the instant case, all the alleged "misstatements" were known to, and pointed out to the arbitrators by, Defendants' counsel. Based on the record, it appears that Defendants' cannot meet the second Bonar element, and therefore are not entitled to vacatur on the basis of fraud.

b. Mere Error of Law is not Ground for Vacatur

It appears that counsel for both parties presented their legal arguments in the usual adversarial way, both orally and through legal memoranda. Plaintiff submitted two briefs and Defendants at least one brief. Defendants' complaint might be construed simply as a difference of opinion on the law; that is, Defendants believe they should have won on the law. An arbitration award will be upheld even when the arbitrators' view of the law is "open to serious question." Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir.1982); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir.1986). "(M)ere error in interpretation of

... law (will) not justify refusal to enforce the arbitrators' decision." Northrop, 811 F.2d 1265 (9th Cir.1987); cf. Rostad, 923 F.2d at 697 (9th Cir.) (rejecting, as self-serving and without merit, claim that the arbitrators "exhibited evident partiality" because, in complaining party's opinion, the arbitrators were wrong on the law). In the instant case, there is more than a possibility of "mere error" in interpreting the law, there is the element of facially meritless defenses raised by Plaintiff.

c. Vacatur on Ground of Undue Means

(1). Contributory Negligence

Plaintiff asserts in its Answer:

(T)he claimants caused or contributed to cause the alleged damages of which the Claimants complain herein and are thus barred by their contributory negligence from recovering such alleged damages from (Plaintiff). To the extent that the doctrine of comparative negligence is applicable (Defendants' claim is barred). (Plaintiffs' Answer P 22) (emphasis added).

Plaintiff does not address this defense in either of the two legal memorandums submitted to the panel. At oral argument Plaintiff's counsel urged that contributory negligence was pled as a defense only "to the extent it applies." The text cited above indicates otherwise. Only comparative negligence was pled "to the extent it applies."

Defendants cite Washington Nat'l Corp. v. Thomas, 117 Ariz. 95, 570 P.2d 1268 (Ct.App.1977) for the proposition that contributory negligence is not a defense to a statutory state securities fraud claim. Thomas so holds. Id. at 102, 570 P.2d at 1275. It is clear to the Court that contributory negligence is no defense to Defendants' state law claim.

(2). Consumer Fraud Statute is Inapplicable

Plaintiff, in its Answer, states:
(Plaintiff) asserts that the Arizona Consumer Fraud Statute (Section 44-521 et seq A.R.S.) is inapplicable to claims arising from the purchase and sales of securities.... and (Plaintiff) is therefore in no event liable (for damages). (Plaintiff's Answer P 29) (emphasis added).

Plaintiff's legal memorandum does not state that the statute is inapplicable to securities fraud as in its Answer; rather it states that the requisite elements for a private cause of action (false promise or misrepresentation made in connection with the sale or advertisement of merchandise, and the hearer's reliance and consequent and proximate injury) cannot be proved by Defendants. Plaintiff cites Dunlap v. Jimmy GMC of Tucson, Inc., 136 Ariz. 338, 666 P.2d 83, 87 (Ct.App.1983) and Parks v. Macro Dynamics, Inc., 121 Ariz. 517, 591 P.2d 1005, 1008 (Ct.App.1979). Dunlap did not mention reliance as an element. Parks stated that the hearer must rely, but that reliance need not be reasonable as at common law. Plaintiff also asserts that the statute was amended in 1983 to specifically preserve estoppel, ratification and laches. The Court found no such amendment. At oral argument Plaintiff's counsel urged that Plaintiff "didn't say (the statute) didn't apply." Plaintiff's Answer refutes this argument.

Defendants cite State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (1983) for the proposition that a 1981 amendment to the consumer fraud statute provided an added avenue of relief for victims of securities fraud. (D.M.V. at 7). Pickrell so holds. Id. at 592, 667 P.2d at 1307. It is clear to the Court that Plaintiff's assertion that the statute is inapplicable to Defendants' state securities fraud claim is meritless.

The purpose of the Court's limited inquiry was to consider whether the "misstatements" were so blatantly against the state of the law as to suggest "undue means." The Court concludes that certain defenses were facially meritless and that Plaintiff knew, or should have known, contributory negligence was no defense to Defendants' state law claims and that the Arizona Consumer Fraud Statute is applicable to claims arising from the sale of securities. Plaintiff should have foregone its contrary arguments.

Although there is little authority construing the meaning of "undue means," and none in the Ninth Circuit, the Court concludes that a party to an arbitration proceeding raising multiple facially meritless defenses constitutes procurement of an award by "undue means" within the meaning of 9 U.S.C. § 10(a). The Court further concludes that permitting an award procured through such conduct to survive even the extremely limited judicial review of arbitration awards would render district courts little more than passive observers of this alternative dispute resolution mechanism. Congress expressed its intention to permit judicial review of arbitral awards, albeit a restrictive review, by enacting 9 U.S.C. § 10. For this Court to confirm the award in the instant case would be to abandon the arbitration process to the parties and do little more than rubber stamp an award procured through questionable, and this Court concludes "undue," means. This, the Court is unwilling to do.

3. Remand for Statement of Reasons for Award

Defendants pray in the alternative for a remand to the panel for a statement of their reasons for the award. Defendants complain about the unfairness of having no reasoning to review; but it is well settled that arbitrators

need not provide any reasons for their decisions, unless required by contract or the rules of the arbitration. E.g., Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 533 (D.C.Cir.1989) (arbitrators not required to give reasons for their decision by either the Federal Arbitration Act or the New York Stock Exchange); O.R. Secs., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742 (11th Cir.1988) (citing Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), overruled on other grounds, Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989)); see also Raiford v. Merrill Lynch, Pierce, Fenner & Smith, 903 F.2d 1410, 1413 (11th Cir.1990) (declining to remand the case to arbitration panel for a statement of reasons because, although it would permit more active judicial review, it would defeat policy in favor of expeditious arbitration); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1102 n. 6 (9th Cir.), cert. denied, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 384 (1986) (citation omitted).

Defendants cite Ainsworth v. Skurnick, 909 F.2d 456 (11th Cir.1990) (per curiam) for the implied proposition that the Eleventh Circuit "adopted the approach of remanding the ambiguous award to the arbitrators" for clarification. This does not appear to be a fair reading of Ainsworth. In Ainsworth, the district court, in the first instance, remanded the award for the arbitrators to specify which of the five counts in the complaint had been violated. Id. at 459 (Appendix 1, D. Ct. Order). This order apparently was not appealed. The district court complained that vagueness "emasculates" judicial review. Id. That court found the award ambiguous because, if a statutory violation were found, damages were mandatory, but not if only a common law violation was found. Id. The

panel found a violation, but gave no damages. Id. When the arbitration panel issued a new order clarifying the basis of its award, the district court decided that the panel erred by not finding a violation of a certain Florida securities statute, and vacated the award "as being in manifest disregard of the law." Id. at 462.

On appeal, the Eleventh Circuit observed that there was no Florida authority construing the statute in question, and certified the question to the Supreme Court of Florida. Id. at 458. The court did not affirm the district court as suggested by Defendants. Id. The issue of remanding for clarification was not before the court and the court made no comments on the issue, except in its brief statement of the facts that where an "award can be interpreted in a variety of ways, it is normal to remand for clarification." Id. at 457. Raiford, decided two months before Ainsworth, seriously undercuts Defendants' assertion that the Eleventh Circuit has "adopted" the approach of remanding arbitration orders for a statement of the reasons for the award.

In sum, Defendants have cited no persuasive authority supporting a remand to the panel for a statement of their reasons for the award.

III. CONCLUSION

Based on the foregoing, it is

ORDERED, that Plaintiff's Application to Confirm Arbitration Award is DENIED, it is

FURTHER ORDERED, that Defendants' Motion to Vacate Arbitration Award is GRANTED, and it is

FURTHER ORDERED, that the matter is remanded for a new arbitration before a different arbitration panel.

A.G. EDWARDS & SONS, INC.,
a Delaware corporation, Plaintiff-Appellant,
v.
William F. McCOLLOUGH and Jeanene MCCOLLOUGH, husband and wife,
Defendants-Appellees.

No. 91-15839.

United States Court of Appeals, Ninth Circuit.

Before: BROWNING, PREGERSON and RYMER, Circuit Judges.

The petition for rehearing is denied.

FILED: July 28, 1992
Cathy A. Catterson, Clerk